

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1491

COMMONWEALTH

vs.

ERNANE LEANDRO DASILVA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant was convicted of rape in violation of G. L. c. 265, § 22 (b). On appeal, the defendant argues that the judge erred in (1) denying his motion for a required finding of not guilty because there was insufficient evidence to allow a jury to conclude there was penetration, a required element of a rape conviction, and (2) failing to give a "Bowden instruction" upon his request.<sup>1</sup> We affirm.

Discussion. 1. Evidence of penetration. At the close of the Commonwealth's case, the defendant moved for a required finding of not guilty, which he renewed at the close of evidence. The trial judge denied both motions, which the defendant argues was error. In reviewing the denial of a motion

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<sup>1</sup> See Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980).

for a required finding of not guilty, we examine "whether the Commonwealth produced enough evidence, taken in the light most favorable to the Commonwealth, to satisfy any rational trier of fact beyond a reasonable doubt that each element of the crime was present." Commonwealth v. Hilton, 398 Mass. 63, 64 (1986). See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). We bear in mind that guilt may be established by circumstantial evidence and that "the inferences a [fact finder] may draw from the evidence need only be reasonable and possible and need not be necessary or inescapable" (quotation and citation omitted). Commonwealth v. Linton, 456 Mass. 534, 544 (2010).

To obtain a conviction of rape, the Commonwealth was required "to prove beyond a reasonable doubt that the defendant committed (1) sexual intercourse (2) by force or threat of force and against the will of the victim."<sup>2</sup> See Commonwealth v. Lopez, 433 Mass. 722, 726 (2001). "Sexual intercourse," as used in the statute, means "the penetration of the female sex organ by the male sex organ, with or without emission." Commonwealth v. Gallant, 373 Mass. 577, 584 (1977). "The element of penetration can be established by evidence that the defendant's penis

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<sup>2</sup> In those cases where a victim is unable to consent on account of unconsciousness, sleep, or intoxication, as in the instant case, the act of penetration will supply the force necessary for conviction. See Commonwealth v. Blache, 450 Mass. 583, 591-592 (2008).

touched or came into contact with the victim's vagina, vulva, or labia." Commonwealth v. Centeno, 87 Mass. App. Ct. 564, 567 (2015). See Commonwealth v. Donlan, 436 Mass. 329, 336 (2002), citing Commonwealth v. Baldwin, 24 Mass. App. Ct. 200, 204-205 (1987) (touching of vulva or labia is intrusion enough to constitute penetration).

Viewing the evidence in the light most favorable to the Commonwealth, we conclude there was sufficient evidence to support a conviction of rape. While penetration is indeed a necessary element to support a rape conviction, it may be proven with circumstantial evidence. See Commonwealth v. Fowler, 431 Mass. 30, 33 (2000). Here, the victim's friend Paula testified that she saw the defendant naked on top of the victim, who was on a couch with her legs spread open. The defendant was holding the victim's thighs open while moving his lower body back and forth.<sup>3</sup> Paula further testified that upon seeing this she ran to get her sister, and that when she returned to the scene seconds later, she observed the victim with her legs still spread open; the victim was wearing underwear that had been pushed to the side, exposing her genitals. The defendant was putting his

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<sup>3</sup> Paula testified, "He was having sex with her," and demonstrated for the jury the defendant's thrusting motion.

pants back on. Such testimony was sufficient to permit the jury to infer penetration beyond a reasonable doubt.<sup>4</sup>

While the jury may have drawn opposite inferences from the evidence presented, as the defendant suggests it should have here, any such inferences are less probable than those we must draw in the light most favorable to the Commonwealth. See Commonwealth v. Alvarado, 93 Mass. App. Ct. 469, 471 (2018) (Commonwealth "need not exclude every hypothesis" to prove guilt [citation omitted]). See also United States v. Red Cloud, 791 F.2d 115, 117 (8th Cir. 1986) (where victim's legs were on either side of defendant, who had his underwear pulled down below his knees, court noted that "[i]t may be conceivable that legal penetration had not occurred, but the realities of human nature make such possibility exceedingly remote"). Indeed, the defendant essentially asks us to depart from the well-established principle that penetration can be inferred from circumstantial evidence, and instead require that penetration be proven only by direct evidence. Fowler, 431 Mass at 33. We

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<sup>4</sup> Although the victim testified that she had no memory of the event and so could give no first-hand account, she did testify to feeling pain in her uterus when she woke up in the hospital the following day.

decline to do so. The defendant's motion for a required finding of not guilty, therefore, was properly denied.<sup>5</sup>

2. Bowden instruction. The defendant also claims that the trial judge erred by denying the defendant's request for a "Bowden instruction" regarding the alleged shortcomings of the police investigation. We disagree. As the Supreme Judicial Court has held, "a judge is not required to instruct on the claimed inadequacy of a police investigation. 'Bowden simply holds that a judge may not remove the issue from the jury's consideration.'" Commonwealth v. Boateng, 438 Mass. 498, 507 (2003), quoting Commonwealth v. O'Brien, 432 Mass. 578, 590 (2000). "In this case, the judge did not remove the inadequacy of the police investigation from consideration by the jury and so complied fully with Bowden's only requirement." Commonwealth v. Williams, 439 Mass. 678, 687 (2003). See Commonwealth v. Bresilla, 470 Mass. 422, 439 (2015). Indeed, the defendant

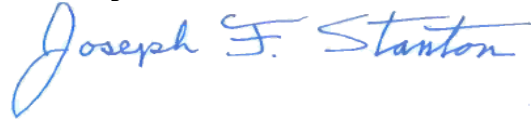
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<sup>5</sup> The Commonwealth additionally presented evidence that five sperm cells (consistent with the defendant's deoxyribonucleic acid) were found on the string of the victim's tampon, which was inside her vagina during the rape. On appeal, the defendant argues that the physical evidence supported his theory that no penetration occurred since no evidence of semen was found in the victim's vagina; the evidence of semen found on the tampon, he contends, was on only the string, which is meant to protrude out of the vagina. The defendant conflates penetration with ejaculation. As either can be present without the other, we need not address this issue further.

remained free to argue, and did argue, the issue of the investigation's inadequacy to the jury. There was no error.

Judgment affirmed.

By the Court (Rubin, Kinder & Singh, JJ.<sup>6</sup>),



Clerk

Entered: July 22, 2019.

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<sup>6</sup> The panelists are listed in order of seniority.